Tan Her Chia v Yeow Wuen Hau

HIGH COURT (MELAKA) — RAYUAN SIVIL NO 1–12–9 OF 2005
LOW HOP BING J
26 JUNE 2007

Evidence — Conflicting testimony — Judge's preference for one witness against the other — Defendant's admission in cross-examination — Whether trial judge was correct in assessment of evidence

Evidence — Hearsay — Admissibility — Purpose of statement — Whether evidence introduced for purpose of establishing truth of statement made by third person or the fact that statement was made — Whether evidence hearsay

Evidence — Hearsay — Failure to object — Plaintiff's counsel did not object to admissibility of evidence — Whether inadmissible evidence rendered admissible by failure to object

On 22 November 2002 at about 9.30 a.m, the plaintiff was riding a motorcycle and was involved in a collision with the defendant's motorcycle. The learned sessions court judge found the defendant wholly liable to the plaintiff in the motor vehicle accident and awarded a sum of RM20,000.00 by way of general damages for closed fracture of left radius and ulna with bend implant DLP, RM1,934-00 as special damages, interest and costs. The defendant appealed to the High Court. At the hearing of the appeal, the defendant abandoned the appeal against quantum and the appeal was confined to the issue of liability only.

Held, dismissing the appeal with costs:

(1) The trial judge considered the damage to the left mirror of the defendant's motorcycle and the left leg injury sustained by the defendant and accepted the plaintiff's evidence as the more preferable version on the ground that had the defendant's version been true, that would have resulted in the collision on the right side of the defendant's motorcycle, instead of the left (see para 8).

(2) The defendant had admitted under cross-examination that he did not see the plaintiff's motorcycle coming from the front. The defendant's own version is therefore discounted by his own evidence (see para 12).

(3) Evidence in the form of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what

A is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made (see para 13).

(4) Hearsay evidence does not become admissible merely because no objection was taken earlier. (see para 20).

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[Bahasa Malaysia summary

Pada 22 November 2002 kira-kira jam 9.30 pagi, plaintif yang sedang menunggang motosikal telah terlibat dalam kemalangan dengan motosikal defendan. C Hakim Mahkamah Sesyen yang bijaksana mendapati defendan bertangungjawab sepenuhnya kepada plaintif dalam kemalangan motosikal dan mengawardkan sejumlah RM20,000-00 sebagai gantirugi am untuk keretakan jari kiri dan tulang lengan dengan bahan implan DLP boleh lentur, RM1,934-00 sebagai gantirugi khas, faedah dan kos. Defendan merayu kepada Mahkamah Tinggi. Semasa pendengaran rayuan, defendan mengabaikan rayuannya terhadap kuantum dan rayuan dihadkan D hanya untuk isu liabiliti sahaja.

Diputuskan, menolak rayuan dengan kos:

E (1) Hakim bicara menimbangkan kerosakkan kepada cermin sebelah kiri motosikal defendan dan kecederaan kaki kiri yang dialami oleh defendan dan menerima keterangan plaintif sebagai versi yang patut diberi pertimbangan berdasarkan alasan bahawa versi defendan adalah betul, yang menyebabkan perlanggaran pada sebelah kanan motosikal defendan, dan bukan sebelah kiri (perenggan 8).

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(2) Defendan telah mengaku dalam pemeriksaan balas bahawa dia tidak nampak motosikal plaintif yang datang daripada arah hadapan. Oleh itu, versi defendan sendiri tidak mengambil kira keterangannya sendiri (perenggan 12).

(3) Keterangan dalam bentuk pernyataan dibuat kepada saksi oleh seseorang yang G tidak dipanggil sebagai saksi mungkin dengar cakap dan mungkin juga bukan dengar cakap. Ia adalah dengar cakap dan tidak boleh diterima bila tujuan keterangan adalah untuk mewujudkan kebenaran terhadap apa yang terkandung dalam pernyataan. Ia adalah bukan dengar cakap dan boleh diterima bila ia mencadangkan untuk mewujudkan keterangan bukannya kebenaran pernyataan, tetapi hakikat bahawa ia telah dibuat (perenggan 13).

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(4) Keterangan dengar cakap tidak akan diterima hanya kerana tiada bantahan yang dibuat sebelumnya (perenggan 20).]

Notes

I For the case on conflicting testimony, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 831.

For cases on admissibility of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1578–1580.

For cases on failure to object hearsay evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1616–1618.

Cases referred to

Henry Trading Co Ltd v Harun [1966] 2 MLJ 281 (dist)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124 (folld)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184 (dist)
Pillai & Anor v Indufela Co & Ors [1980] 2 MLJ 176 (dist)
Soo Leot, Re [1956] MLJ 54 (folld)
Subramaniam v Public Prosecutor [1956] MLJ 220 (folld)

Felix Sennyah (Sennyah & Co) for the defendant.
Ng Chee Seng (Murphy & Dunbar) for the plaintiff.

Low Hop Bing J:

APPEAL

[1] This appeal lodged by the appellant ('the defendant') was originally against liability and quantum handed down by the learned sessions court judge ('the trial judge') who had found the defendant wholly liable to the plaintiff in a motor vehicle accident and awarded a sum of RM20,000 by way of general damages for closed fracture of left radius and ulna with bend implant DLP, RM1,934 by way of special damages, in addition to interest and costs.

[2] The defendant has subsequently abandoned the appeal against quantum. Hence, this appeal is confined to the issue of liability only.

FACTS OF THE CASE

[3] The parties have agreed that on 22 November 2002 at about 9.30 am, the plaintiff ('SP2') was riding a motorcycle bearing registration No MJ 7764. It was involved in a collision with the defendant's motorcycle bearing registration No. MAG 7821. The weather was fine and the tarred road was dry.

[4] According to the plaintiff, he was proceeding from his house in Kampong Lapan, Tengkera Melaka to Pengkalan Rama to buy his breakfast. As he reached Cheng Cheong coffee shop on his left, the defendant suddenly reversed his motorcycle manually and caused the plaintiff's motorcycle to collide with the left side of the defendant's motorcycle. This version was consistent with the police report lodged by the plaintiff.

[5] The defendant, on the other hand, testified that after having had his breakfast in the coffee shop, he was riding his motorcycle towards the direction of the traffic light. He manually reversed his motorcycle. The plaintiff's motorcycle entered onto the wrong side of the road and collided with the front left side of his motorcycle. The defendant's police report revealed that the plaintiff's motorcycle have travelled in the reverse direction from Pengkalan Rama.

[6] The investigating officer ('SP1') testified that he had information from the defendant's police report and one Ong Thian Seng ('Ong') that the plaintiff's motorcycle had wrongly entered onto the road. The investigating officer however did not investigate the report lodged by the plaintiff.

[7] The trial judge considered the damage to the left mirror of the defendant's motorcycle and the left leg injury sustained by the defendant and accepted the plaintiff's evidence as the more preferable version on the ground that had the defendant's version been true, that would have resulted in the collision on the right side of the defendant's motorcycle, instead of the left.

SP1'S EVIDENCE

[8] It was submitted by learned counsel Mr Felix Sennyah for the defendant that the trial judge had erred in rejecting the evidence of SP1 as an independent witness. He relied on *Henry Trading Co Ltd v Harun* [1966] 2 MLJ 281

[9] Mr Ng Chee Seng submitted for the plaintiff that SP1's evidence was not based on his personal knowledge but was hearsay from Ong who was not called as a witness and so SP1's evidence is inadmissible. Support was sought from *(1) Subramaniam v Public Prosecutor* [1956] MLJ 220 and (2) *Re Soo Leot* [1956] MLJ 54.

[10] I have to decide whether the trial judge is correct in rejecting the evidence of SP1 and consequently the defendant's version.

[11] In my judgment, it needs to be observed that the defendant had admitted under cross-examination that he did not see the plaintiff's motorcycle coming from the front. The defendant's own version is therefore discounted by his own evidence.

[12] Although Ong was said to have provided information to SP1, he was not called as a witness. Such evidence in the form of a statement made to a witness (SP1) by a person (Ong) who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made: *Subramaniam per Mr LMD de Silva* at p 222 right column and *Re Soo Leot* at p 66 per Buhagiar J.

[13] SP1's evidence may therefore be rejected on two grounds viz:

(1) it is not supported by the defendant's own evidence as he has admitted that he did not see the plaintiff's motorcycle coming from the front; and

(2) it is merely admissible to establish the fact that it was made by Ong, but not the truth of what was contained in the statement or information.

[14] Henry Trading relied on by the defendant concerns a motor vehicle accident in which there were two varying accounts of what actually happened. At p 281,

Wan Suleiman J (later SCJ) delivering judgment for the Federal Court, felt that the proper thing to consider was not so much what the plaintiff said or what the defendant said but what the sergeant, an independent witness, had to say in the matter. The sergeant's evidence relating to the tyre marks at the scene of the accident was consistent with what was admitted by both the parties therein. However, the Federal Court was not called upon to decide on the question of hearsay evidence. Hence, both the facts and the issue were readily distinguishable from those in the appeal before me.

NO CHALLENGE TO EVIDENCE

[15] It was contended for the defendant that the entire evidence of SP1 was never challenged and so should have been accepted by the trial judge. In support thereof, two authorities were cited: (1) *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 and (2) *Pillai & Anor v Indufela Co & Ors* [1980] 2 MLJ 176.

[16] The plaintiff relied on *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 and responded that hearsay evidence does not become admissible simply because it was not challenged.

[17] In my judgment, the appellant's evidence in Multar was consistent with his report and sketch plan. His evidence as to how the accident occurred was not challenged. The admissibility of his evidence was not related to hearsay. Indeed, hearsay evidence was not an issue in the judgment delivered by Syed Othman FJ (as he then was) at p 185F left column. So also in *Pillai & Anor*.

[18] The issue in this appeal before me is of a different dimension. As alluded to above, SP1's evidence is based on the defendant's version and the defendant did not see the motorcycle coming from the front. It is further negated by reason of it being hearsay evidence. Hence, I am unable to see the applicability of *Multar and Pillai & Anor* to the defendant's case.

[19] An issue identical to that in the instant appeal is to be found in *Malaysia National Insurance Sdn Bhd*. There, the material part of the evidence of DW1 was clearly hearsay evidence. Although there was no objection taken to such evidence, at p 127 left D–F, Lee Hun Hoe CJ (Borneo) (as he then was) held that hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier. His Lordship added that the authorities are clear on this and cited Sarkar Law of Evidence (13th Ed) p 51 which reads:

> An erroneous omission to object to evidence not admissible … under the Act does not make it admissible. It is the duty of the court to exclude … inadmissible evidence even if no objection is taken to its admissibility by the parties. …

[20] I am therefore unable to see the merits in the contention raised for the defendant.

A IV CONCLUSION

[21] On the foregoing grounds, I hold that the trial judge has arrived at the correct decision. This appeal is dismissed with costs. The trial judge's decision is affirmed.

B *Appeal dismissed with costs.*

Reported by Brendan Navin Siva

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